

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 10/25/13; Decision Issued: 11/04/13; Agency: VDH; AHO: William S. Davidson, Esq.; Case No. 10111; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 11/19/13; EDR Ruling No. 2014-3769 issued 12/11/13; Outcome: Remanded to AHO: Remand Decision issued on 12/17/13; Outcome: Original decision affirmed; **Administrative Review**: DHRM Ruling Request received 11/19/13; DHRM Ruling issued on 01/13/14; Outcome: AHO's decision affirmed.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10111

Hearing Date: October 25, 2013  
Decision Issued: November 4, 2013

**PROCEDURAL HISTORY**

A Group III Written Notice was issued to the Grievant on April 17, 2013, for:

This disciplinary action is taken as a result of a Virginia Department of Health (VDH) Investigative Report. The investigative findings supported the allegation that [Grievant] violated DHRM Policy #1.80, *Workplace Violence*.<sup>1</sup>

Pursuant to the Group III Written Notice, the Grievant was terminated on April 17, 2013.<sup>2</sup> On May 3, 2013, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On June 3, 2013, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 25, 2013, a hearing was held at the Agency's location.

**APPEARANCES**

Attorney for Agency  
Agency Party  
Attorney for Grievant  
Grievant  
Witnesses

**ISSUE**

Did the Grievant's actions constitute a violation of DHRM Policy #1.80, Workplace Violence?

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-

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<sup>1</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 1, Page 1

3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>4</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing nineteen (19) tabs. That notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing thirty-two (32) tabs. That notebook was accepted in its entirety as Grievant Exhibit 1.

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<sup>4</sup> See Va. Code § 2.2-3004(B)

<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Hearing Officer first received this matter on June 3, 2013. A hearing was scheduled for July 20, 2013, however, before the commencement of that hearing, the Agency and the Grievant reached an Agreement (“Agreement”) in this matter. Indeed, on July 23, 2013, the Hearing Officer entered an Order dismissing this matter based on that Agreement and the representations of counsel for both the Agency and the Grievant. Subsequently, it appears that the Agreement was not consummated because of new requirements that were introduced by a third party. Accordingly, this matter was reassigned to this Hearing Officer for the hearing that took place on October 25, 2013.

DHRM Policy #1.80, under Definitions of Workplace Violence, states as follows:

Any physical assault, threatening behavior or **verbal abuse** occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, **psychological trauma such as threats**, obscene phone calls, **an intimidating presence, and harassment of any nature such as** stalking, **shouting** or swearing.<sup>8</sup> (Emphasis added)

Policy # 1.80, under Prohibited Actions, states in pertinent part as follows:

Prohibited conduct includes, but is not limited to:

...engaging in behavior that subjects another individual to extreme emotional distress...<sup>9</sup>

Employees who are found to have violated Policy 1.80, are subject to punishment pursuant to Policy 1.60, Standards of Conduct, up to and including termination.

The Hearing Officer heard from approximately fourteen (14) witnesses over nine (9) hours in this matter. The witnesses were evenly divided between witnesses for the Agency and witnesses for the Grievant. It is probably unsurprising that the witnesses for the Agency testified that the Grievant was a bully. The Hearing Officer heard testimony that the work situation, under the Grievant, was toxic, brow-beating and that the Grievant yelled at employees. One witness testified before the Hearing Officer that the Grievant said to her in a very loud voice, “children continue to die in Virginia,” because you do not work hard enough. Several Agency witnesses used the phrases “verbal abuse, psychological trauma, shouting.” Indeed, at least two (2) of the Agency witnesses would not even look at the Grievant or the Grievant’s counsel during their testimony.

The witnesses for the Grievant testified that, with the possible exception of one (1) occasion, they never heard the Grievant yell at anyone, never heard her slam her door, that she was a good boss to work for and, in general, they had no problems at all working with, for, and under the Grievant. Many of the Grievant’s witnesses testified that she was direct and to-the-

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<sup>8</sup> Agency Exhibit 1, Tab 3, Page 1

<sup>9</sup> Agency Exhibit 1, Tab 3, Page 1

point, and that she demanded quality work. Of course, none of those descriptions would be a violation of DHRM Policy 1.80, unless they were presented in an unacceptable manner.

The testimony before the Hearing Officer quite accurately described the Grievant as two (2) separate people. One - a good boss; and, Two - the worst boss that could possibly be created.

The Grievance Procedure Manual, at Section 5.9(a), sets forth the relief that a Hearing Officer may offer to a Grievant. That section is set forth as follows:

Relief may include, but is not limited to:

1. Reinstatement to the employee's former position or, if occupied, to an equivalent position;
2. Reduction or rescission of disciplinary actions;
3. An award of full, partial or no back pay, from which interim earnings must be deducted;
4. The restoration of full benefits and seniority;
5. An order that the agency comply with applicable law and policy;  
and
6. Attorney's fees in discharge grievance hearings where the hearing officer orders reinstatement and the employee is represented by an attorney, unless special circumstances would make an award unjust.

In relationship to the relief which the Hearing Officer may grant, the Hearing Officer feels that the Agreement which the parties reached on or about July 23, 2013, which caused them to instruct the Hearing Officer to dismiss the grievance, probably reached a more equitable decision than the Hearing Officer can reach based on the conflicting testimony that he received. Accordingly, to the extent that the Hearing Officer has this authority, pursuant to Section 5.9(a), of the Grievance Procedure Manual, the Hearing Officer orders that the Agreement, as constituted before the intervention of a third party, be reinstated between the parties with the following changes:

1. Whatever back pay, attorney's fees, and/or other benefits granted shall be frozen as of the date of the original Agreement. No additional back pay, no additional benefits, no additional attorney's fees shall be awarded;
2. As an addition to that Agreement, the Hearing Officer orders that the Grievant agree that she shall not seek employment by any means from this Agency for ten (10) years from the date of this Hearing Officer's Decision.

If, and only if, the Grievant does not accept the terms set forth above, then the Hearing Officer rules that, while the testimony before the Hearing Officer was immensely conflicting and while the Hearing Officer had to assign to each witness different levels of believability based on their demeanor and character as they testified, the Hearing Officer did find one witness (AB), who was more reliable and more believable than all others, including the Grievant. This witness worked for the Agency for approximately five (5) months, and reported directly to the Grievant. This witness testified that, in that short time frame, she found working for the Grievant to be frustrating, inconsistent, frightening and chaotic. She further testified that there was a day where the Grievant, with her teeth gritted, screamed at her in a loud and harsh tone of voice, "I do not care that you do not like that I am your supervisor." This type of action caused this witness extreme anxiety while she worked with the Grievant. Indeed, prior to her leaving, she elected to have voluntary surgery for the simple reason that it allowed her to be away from the Grievant. She further testified that the Grievant told her that she was an embarrassment to the Agency. Based on the believability of this witness's testimony, the Hearing Officer finds that the Grievant violated DHRM Policy 1.80. That policy clearly sets forth that such a violation is subject to The Standards of Conduct found in Policy 1.60, and that Policy clearly provides for a termination based on a single event if the Agency deems that termination is the proper remedy.

The Hearing Officer believes that the Agreement between the parties with the two (2) caveats as above-referenced, most likely reaches the best and most equitable settlement between these parties. However, if the Grievant is not willing to accept that Agreement, with those two (2) caveats, then the Hearing Officer specifically finds that, based on the testimony of this one (1) witness, that the Agency has borne its burden of proof in this matter and that termination is the proper remedy.

### **MITIGATION**

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."<sup>10</sup> Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Grievant's number of years of longevity and his previous performance evaluations were taken into account to mitigate this offense.

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<sup>10</sup> *Va. Code § 2.2-3005*

## DECISION

For reasons stated herein, the Hearing Officer directs that the earlier Agreement between the parties, with the two (2) caveats as referenced in this Decision, be honored. If the Grievant is not willing to accept that Agreement, with those two (2) caveats, then the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice to the Grievant, with termination, was appropriate.

## APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received by** the reviewer within 15 calendar days of the date of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>11</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>12</sup>

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<sup>11</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson  
Hearing Officer

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judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>12</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.